No. 88.

Brf. of Atty. Gen. (Beck) for U. S.

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In the Supreme Court of the United States.

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v.
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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

JAMES M. BECK,
Assistant Attorney-General.

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STATEMENT OF THE CASE.

This suit was brought by the United States against Andrew W. Smyth as superintendent of the United States mint at New Orleans and the sureties on his official bond to recover $25,000, which he received and which he did not account for, as the condition of his bond required.

The bond as set forth in the record was conditioned as follows:

> Now, therefore, if the said Andrew Woods Smyth shall faithfully and diligently perform, execute, and discharge all and singular the

> duties of said office according to the laws of the United States, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

Section 3506, Revised Statutes, provides:

> The superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or the expenses of the mint.

Section 3501, Revised Statutes, provides:

> The superintendent, the assayer, the melter and refiner, and the coiner of each mint, before entering upon the execution of their respective offices, shall become bound to the United States, with one or more sureties, approved by the Secretary of the Treasury, in the sum of not less than ten nor more than fifty thousand dollars, with condition for the faithful and diligent performance of the duties of his office.

The trial court directed a verdict for the Government as prayed for The contention of the defendants is that the shortage of $25,000 was occasioned by a fortuitous event, to wit, a fire in the vault in which the funds intrusted to the superintendent were kept.

Let us examine briefly the facts as disclosed by the evidence. A short time prior to the date of the discovery of the fire a new steel vault, of modern and approved pattern, was constructed for the use of the superintendent in the storage and protection of the funds intrusted to his keeping. (Record, p. 85.) On Monday morning, June 26, 1893, James M. Dowling,

cashier under Superintendent Smyth, who testified on behalf of the defendants, upon opening the inner door of this vault discovered smoke. He entered the vault and carried out a certain tin box, containing paper money, which had been placed on a wooden box which he testified was used for waste paper and other office accumulations. (Record, pp. 66, 75.) He had left the tin box there when he closed the vault the Saturday preceding, notwithstanding there was an iron safe within the vault sufficiently large to easily admit the tin box. (Record, p. 132.)

To make his negligence still more patent, the cashier had left the cover of the refuse box open, and had placed the tin box across one corner of the open box. This wooden refuse box contained waste paper, twine, wax, the stub of a candle, and a quantity of pine kindling wood (pp. 73, 75, 109, 112). Dowling, with the assistance of Warrant Clerk Gee, carried the wooden box out of the vault, after he had carried out the tin box, and overturned it on an ash pile near by. The box was then more or less charred outside and in, and its contents in a like condition, although the fire had then gone out. It was apparent that what fire there was had been confined principally to this refuse box, which had been constantly in use as a waste box, and with its combustible contents was constantly left in the vault, and the tin box containing the paper money had usually been left thereon. But the negligence does not end here; the shelves of the vault were covered with paper, matches were left about, and a coal-oil lamp

was attached to the side of the vault by a bracket (p 78). Dr. Smyth, the superintendent, knew that all these conditions existed, as he was in and out of the vault several times a day (pp. 77, 78).

Dr. Barrett, the Government expert, who made an examination of the premises immediately after the fire, found a burned match in the tin box (p. 135). He found the coal-oil lamp, which still contained a little oil, on the floor of the vault, and was informed by Dowling that it had not been touched since the fire. The chimney was near the lamp, and not broken; neither was the lamp, which was a metal one, dented in any way; it had been wrenched from its socket, and how this could have accidentally occurred was not explained (p. 128). Inasmuch as the vault was lighted by incandescent lights, it was entirely unnecessary to keep this lamp therein.

Cashier Dowling, whose testimony stood alone and unsupported, said that he was "satisfied" that there was $25,000 worth of all kinds of paper money in the tin box previous to the fire. He did not explain how there happened to be exactly this sum in the box at that time, although he was asked to do so by the court. He claimed that he had received the money from stevedores, who frequently visited the mint in order to get silver dollars to pay off their hands, and who gave him this paper money in exchange for the silver dollars. The falsity of this was shown by the fact that the serial numbers of the notes ran consecutively.

Moreover, Dr. Barrett, the Government expert referred to, and Mrs. L. E. Rosenberg, a lady who had been employed in the redemption division of the Treasury Department since 1863, after making a careful investigation of the contents of the tin box, testified that it contained only $1,182, the serial numbers of notes of different denominations running consecutively. (See pp. 151, 152, 153, 154.) When Dr. Smyth turned over this tin box to Dr. Barrett and Mrs. Rosenberg for examination he informed them that the $500 bill which was then in the box was not there when he first saw the box after the fire (p. 146). Aside from this $500 bill and one $100 bill, four $50's, and one $20, the largest denomination of any bill was $2. Mrs. Rosenberg testified that the bills in the tin box, in her judgment, were new bills. While the bills were charred, and the edges more or less burned, the witnesses had no difficulty in determining with a glass their issue and denomination. They found scarcely a tablespoonful of ashes in the box, and these they testified came from the burned edges of the money. (Rec., p. 146.) In other words, their testimony showed conclusively that, aside from this $500 bill, there was only $682 in the box previous to the fire. After the fire this was not money, but a mass of charred paper. It could no longer circulate as money, and its real character could only be detected by experts.

The issue here is a clean-cut one, as Dr. Smyth, in his final account of July 24, 1893, the date of the transfer of his office, *includes this $25,000 as due the United States.* (Pages 30 and 54.)

ARGUMENT.

I.

DID THE COURT ERR IN DIRECTING A VERDICT FOR THE GOVERNMENT?

The learned judge who directed this verdict, in assigning his reasons therefor, which he made "part of each and everyone of the defendants' bills of exceptions," said:

> It is perfectly clear that the Federal courts have uniformly held that in such a bond as Dr. Smyth's the officer is virtually an insurer and can not be relieved even against an unavoidable loss, except only when the loss occurs by an act of God or of the public enemy and without any neglect or fault on the part of the officer.
>
> *Of course, in the present cause the loss was not unavoidable. Nay, more, it would seem to have been caused by the fault of persons for whom Dr. Smyth was responsible.* But even if in this cause the loss had been shown to have resulted from an accidental or unavoidable cause (no act of God or of the public enemy being involved), Dr. Smyth would still be liable under the clear and uniformly concordant decisions of the Federal courts.
>
> The motives of high public policy which require that United States custodians of public moneys be held to a strict accountability are well stated by Mr. Justice McLean in *United States* v. *Prescott*, 3 How., p. 578, and by Mr. Justice Strong in *Bevans* v. *United States*, 13 Wall., p. 62. (Record, p. 20.)

Toulmin, district judge, in writing the opinion of the circuit court of appeals, after reviewing the authorities bearing upon the questions in issue, sustained the lower court, and added:

> *Irrespective of the views hereinabove expressed as to the defendants' liability, we think the undisputed evidence showed such want of care on the part of the superintendent's cashier as to have justified the circuit court in directing a verdict for the plaintiffs.*

Newman, district judge, who concurred in the result, said:

> I concur in the judgment of the court in this case, because I think under the evidence the circuit court was clearly justified in directing a verdict for the plaintiffs. *The evidence not only failed to show proper care of the funds in the hands of the superintendent of the mint, but showed actual negligence on the part of the cashier, which negligence of his subordinate must be charged to the superintendent in this suit*

According to the undisputed evidence, a modern, steel, fireproof vault had been provided for the protection of this money. A wooden box, into which all sorts of combustible material was thrown and permitted to remain, was kept in this vault by the cashier, with the knowledge of the superintendent. This box was left open, and a tin box containing paper money was left on one corner of it. This was admitted by the cashier, who testified that he frequently left the tin box there. Paper was put on the shelves of the vault; matches, burned and unburned, were thrown or

left about, and a coal-oil lamp was also kept in the vault. This lamp was on the floor after the fire. Had the tin box been placed in the small safe inside the vault its contents could not have been injured. If the wooden refuse box had not been left in the vault and no other combustible material had been permitted to accumulate therein, no fire could have occurred. To permit such conditions to exist as did exist was negligence—negligence so clear and well established that the court could not do otherwise than direct a verdict for the Government.

It is now well settled that "a case may not be left to the jury unless there is evidence which will warrant a verdict in favor of the party producing it." (Enc. Pleading and Practice, vol. 6, p. 678, and the citation of authorities in note 1 from the courts of last resort of many of the States of the Union and several from this court.)

In *Stewart* v. *Lansing* (104 U. S., 505), Mr. Chief Justice Waite adopted the language of the court in *Pleasants* v. *Fant* (22 Wall., 116), where it was said that "if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant a particular verdict, the jury might be so instructed."

Assuming that this money may have been burned without any fault or negligence on the part of Dr. Smyth, that fact can not be set up as a defense either by him or his sureties on this action on his bond. The principle here contended for is well settled in a leading

text-book, Throop's "Law of Public Officers and Sureties in Official Bonds," published as late as 1892:

> Where, however, there are no statutory provisions rendering the case exceptional, and the bond is in the usual form, conditioned for the faithful performance of the officer's duty, with or without an additional condition for the faithful disbursement and accounting or the like, the courts of the United States and of several of the States regard a receiving and disbursing officer as a debtor for or an insurer of the public money in his hands, and refuse to allow him or his sureties to escape liability therefor, although it is stolen, or lost, or taken by irresistible force and without his fault.
>
> The only exception which the Federal courts have allowed to the liability of the officer and his sureties for money received and not accounted for and paid over, is where the officer was prevented from doing so by the act of God or the public enemy. (Secs. 222, 223.)
>
> A receiver of public money is liable, *virtute officii*, in the absence of a contract, only as an ordinary bailee. But if he executes a penal bond, in which he binds himself to perform the duties of his office without exception, he becomes an insurer; the contract, not the law, makes such an officer an insurer. (Am. and Eng. Enc. of Law (1st ed.), vol. 2, p. 466.)

The contention here made that a custodian of the public funds under his contract evidenced by a penal bond is something more than an ordinary bailee is sustained by a long and unbroken line of Federal adjudications.

United States v. *Prescott*, 3 Howard, 578 (1845), was the first case that came before the court. In it Prescott, a receiver of public moneys at Chicago, was sued on his official bond. The condition of the bond was:

> That the said Prescott has "truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge all the duties of said office according to the laws of the United States; and, moreover, has well, truly, and faithfully kept, and shall well, truly, and faithfully keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered by the proper department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and should faithfully and promptly make, the same, as directed," etc.

The defense was that the money had been stolen from the defendant without any fault or negligence on his part. The court, speaking through Mr. Justice McLean, ruled squarely on the question. It said:

> On the part of the defendant it is contended that the defendant, Prescott was a depositary for hire and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law on such a depositary; that the special contract does not enlarge his liability.

> This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond and principles which are founded upon public policy.

Then, after reciting the conditions of the bond, Judge McLean continues:

> The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money has been stolen from him.
>
> The objection to this defense is that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the Government. How then, can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. *The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond.* * * *
>
> As every depositary receives the office with a full knowledge of its responsibilities, he can not, in case of loss, complain of hardship. He

> must stand by his bond, and meet the hazards which he voluntarily incurs. (3 Howard, 588–589.)

In *United States* v. *Morgan et al.*, 11 Howard, 154 (1850), the defendant was collector of customs for the district of Mississippi, and his bond was conditioned: That the said Morgan "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office."

The breach was that he had received as such collector certain Treasury notes, which were canceled by him, but afterwards lost or purloined without his knowledge or consent. The Supreme Court held that this was no excuse to a suit upon his bond, and Mr. Justice Woodbury, in delivering the opinion, said:

> The argument which has been pressed to exonerate him (i. e., the collector) even from this extent of liability rests on an erroneous impression that he was acting as bailee and under the responsibilities of only the ordinary diligence of a depository as to the canceled notes, when in truth he was acting under his commission and duties by law as collector and under the conditions of his bond.
>
> * * * * *
>
> He did not receive them (the notes) as bailee, but as collecting officer. He is liable for them on his bond and not on any original bailment or lending.

The next case was *United States* v. *Dashiel*, reported in 4 Wall., 182 (1866). This was a suit against a pay-

master in the United States Army, brought upon his official bond, which was conditioned for "the faithful discharge of his duties. These duties required him to keep safely all public moneys in his charge and pay them over when required to do so."

The defense was that Dashiel had received some money at Charleston, S. C., for the purpose of paying off the troops at Forts Dallas and Capron, Fla., and that, "being compelled to stop at Palatka several days," some $13,000 of this money had been stolen from him. The court below instructed the jury that the theft or robbery was a good defense, provided it did not occur through any fault or lack of proper care and vigilance on the part of the defendant. After a verdict and judgment for the defendant the Government appealed, and the Supreme Court, following *United States* v. *Prescott* and *United States* v. *Morgan*, disposed of the case by saying, through Mr. Justice Nelson, "The question involved in this case has already been twice decided by this court and need not again be examined." (*United States* v. *Dashiel*, 4 Wall., 182.)

United States v. *Keehlen* (9 Wall., 83) was decided in 1869. The defendant was postmaster at Salem, in the State of North Carolina, and his official bond was conditioned that he should (we quote from the report)—

> well and truly execute the office of postmaster, and, among other things, render accounts once in three months and pay all balances, and keep safely, without lending, using, or depositing in banks or exchanging for other funds than as allowed by law, all

> public money at any time in his custody until the same was ordered by the Postmaster-General to be transferred or paid out, and that when such orders for transfer or payment were received that he should faithfully and promptly make the transfer or payment as directed.

The defense was that Keehler, acting under an order from the Confederate States, paid out the money. The court (Mr. Justice McLean) said that it had already been decided more than once (referring to *United States* v. *Prescott*, *United States* v. *Dashiel*, and *United States* v. *Morgan*) "that in an action on an official bond the right of the Government did not rest on the implied contract of bailment, but on the express contract found in the bond;" and, further, that the court could not concede that a citizen who owed allegiance to the United States as an officer thereof was at liberty to turn its money over to an insurrectionary government.

In *United States* v. *Bevans*, 13 Wallace, 56 (1871), the defendant had been the receiver of public money for a land district in Arkansas. His bond was conditioned that he "should have truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge, all the duties of the said office."

These duties, the Supreme Court decided, were defined by the acts of Congress and by the Treasury regulations made under those acts. The defense was that the money had been forcibly taken from him by the agents of the Confederate States, but it was also in

evidence that before force had been brought to bear upon him he had paid the moneys over. Mr. Justice Strong, in delivering the opinion—the defendant was held liable—says expressly:

> It is not to be overlooked that Bevans was not an ordinary bailee of the Government. Bailee he was undoubtedly, but by his bond he had insured the safe-keeping and prompt payment of the public money which came into his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater.

In 1871 the question came again before the Supreme Court in *Boyden* v. *United States*. In this case the United States sued Boyden and his sureties on his bond as receiver of public moneys for a land district in Wisconsin. The bond was given pursuant to an act which provided:

> The receiver of public moneys shall, before he enters upon the duties of his office, give bond with approved security for the faithful discharge of his trust.

And the bond was conditioned (we quote from the report)—

> That if the said Boyden truly and faithfully executed and discharged all the duties of his said office according to law, then the obligation should be void.

The plea was that Boyden had been suddenly beset by some person or persons to him unknown and thrown down and, against all defense that he could make, gagged and bound, and the moneys described in the

complaint violently and without his fault taken from him and carried away. It was decided by the Supreme Court that even this was no defense.

Mr. Justice Strong, in delivering the opinion, said:

> Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, virtute officii, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. HE MAY, HOWEVER, MAKE HIMSELF AN INSURER BY EXPRESS CONTRACT, AND THIS HE DOES WHEN HE BINDS HIMSELF IN A PENAL BOND TO PERFORM THE DUTIES OF HIS OFFICE WITHOUT EXCEPTION. THERE IS AN ESTABLISHED DIFFERENCE BETWEEN A DUTY CREATED MERELY BY LAW AND ONE TO WHICH IS ADDED THE OBLIGATION OF AN EXPRESS UNDERTAKING. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting
184 party and not within his control, he will not be excused.

After citing various cases in the State courts, Mr. Justice Strong declares that the rule as laid down in *United States* v. *Prescott* must be followed. He says:

> It is true that in Prescott's case the defense set up was that the money had been stolen, while the defense set up here is robbery. But that can make no difference unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it. Inasmuch as plaintiffs in error practically concede that untill the case of *United States* v. *Thomas*, 15 Wall., 337 (1872), the uniform decisions of this court had been adverse to their contention in this case we may be pardoned for considering that decision somewhat at length and its bearing upon the question here in issue.

In the Thomas case the defendants were sued as principal and sureties on the official bond of the surveyor of customs at the port of Nashville, Tenn. "The condition of the bond," says the report, "was in the usual form:"

> That he should faithfully execute and discharge the duties of his office according to law, and should well, truly, and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by act of Congress, all the public moneys collected by him or otherwise placed

> in his possession and custody till the same should be ordered by the proper department or officer to be transferred or paid out; and when such orders for transfer or payment were received, should faithfully and promptly make the same as directed, and should perform all other duties as fiscal agent of the Government which might be imposed by any act of Congress or regulation of the Treasury Department, etc.

The defense was that the moneys sued for had been seized by the Confederate authorities by the exercise of force, which the defendant was unable to resist, and that there was an organized insurrection existing at that time in the State of Tennessee against the Government, and, further, that the defendant had acted in good faith, and that if he had not given up the money in his hands it would have been forcibly taken from him. Counsel admitted the authority of Prescott's case and the later decisions of the court and based the defense solely on the ground that the defendant had been unable to perform his duties because of the act of a public enemy. On this ground, and on this ground alone, the Supreme Court ruled against the Government. Mr. Justice Bradley says in his opinion:

> This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal Government agents, against their will and without their fault or negligence, is or is not a sufficient discharge from the obligations of their official bonds. This precise question has

not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the Government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty and to have the property forthcoming when required?

* * * * *

That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and, aside from such a bond as exists in this case, seems almost self-evident. If it were not, then every military commander who ever lost a battle or was obliged to surrender his ship or fort or other public property added a civil obligation to his military misfortune. And as regards this question, it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the Government, the loss falls on the Government; if it belongs to individuals, it falls on them.

The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance

> of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desired, it must be prescribed by statute or *exacted by express stipulation.*

The case, so far from disturbing the conclusions in the prior decisions, as our opponents have argued in their briefs, is thus a direct reaffirmance of the doctrine that the execution of an official bond adds an additional and more stringent liability to that of the bailee at common law. It is true that Mr. Justice Bradley does criticise so much of the language of the prior decisions as held that a public official who has given bond is not a bailee. In this connection he says:

> *These provisions show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability.* The legislative anxiety on the subject culminates in requiring them to enter into a bond, with sufficient sureties, for the performance of their duties and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the nonproduction of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when

> they are expressly forbidden to touch or use the public moneys except as directed, would be an abuse of terms. *But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment can not be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds it is fixed by special contract, and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same.* (Pages 346–347.)

It will thus be seen that while the court questions the propriety of the language of prior decisions that public officers are not bailees, yet it subsequently concurs with prior rulings that though they may be bailees, yet the policy of the law, as well as the letter of the bond, imposes much higher obligations than those of a bailee at common law. The use of terms is not important as long as the result is the same.

It is moreover true that the court, in the Thomas case, did say that "Where, however, a *statute* merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it can not, without more, be regarded as enlarging or in any way affecting the degree of his responsibility." (Page 345.)

It will be observed that the court is speaking of a statute, not of a bond. All decisions, including that of *United States* v. *Thomas*, concur, as has been shown, that the bond of an official, as was said by Mr. Justice

Bradley in the Thomas case, "enlarges the implied obligation of the receiving officer and deprives him of defenses which are available to an ordinary bailee."

This view of the Thomas case was recently sustained by the circuit court of appeals in the Bosbyshell case, which was an action brought by the United States upon the official bond given by Oliver C. Bosbyshell as Superintendent of the United States mint in Philadelphia. Acheson, circuit judge, speaking for the court, said:

> But it is contended that the language of the statute simply declares the common-law duty of a bailee to keep in a safe manner, and that the absence of an express contract to deliver relieves the defendants from the stringent rule of responsibility enforced in the cited cases. We think, however, that the words of the statute, "safely keep until legally withdrawn," clearly import an obligation to deliver to the Government or according to its orders, and that such a liability must be read into the condition of the bond. But even if the condition of the bond to "safely keep" is to be understood in the strictest sense of the language used, still, upon the principle of the adjudged cases referred to, the obligors would be answerable for a loss by larceny, although without fault or negligence on the part of the official, because the obligation to keep safely is without any qualification or exception. The case of *United States* v. *Thomas*, 15 Wall., 337, does not, we think, help the plaintiffs in error; *for the only point there determined was that the*

forcible seizure of public property by the public enemy, without fault or neglect of the officer in charge, excused compliance with the condition of his official bond. That case, it seems to us, does not weaken the authority of the previous decisions of the Supreme Court upon the particular question now before us. (*Bosbyshell* v. *United States*, C. C. A., 77 F. R., 944, affirming 73 F. R., 616.)

In the case at bar, therefore, the *statute* which requires the superintendent of a mint to "keep safely until legally withdrawn" may not enlarge the common-law duty, but the *bond* of Dr. Smyth, by which he expressly obligated himself to "keep safely until legally withdrawn," "enlarges the implied obligation of the receiving officer and deprives him of defenses which are available to an ordinary bailee."

The other distinction in the Thomas case does not affect the pending question, viz, that there is a difference "between an absolute agreement to do a thing and a condition to do the same thing inserted in the bond." Under a well-known principle of law, default in a condition is excused by two causes, viz, the act of God or a public enemy, and all that the Thomas case decides is that the seizure of property by a public enemy in a state of war will excuse the receiving officer.

Mr. Justice Miller dissented in *United States* v. *Thomas*, and did so partly for the reason that an act of Congress had been already passed, affording relief in such cases through the Court of Claims. As this act was passed in view of the prior decisions of the court, it is inter-

esting to refer to it as showing the interpretation which Congress had placed upon them.

> That the Court of Claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, and papers in his charge, and for which such officer was and is held responsible: *Provided*, That an appeal may be taken to the Supreme Court as in other cases. (Act of May 9, 1866.)

It is interesting to note that the supreme courts of two Western States have already noticed *United States* v. *Thomas*. In *State* v. *Moore*, 74 Mo., 413 (1881), and *State* v. *Nevada*, 19 Nevada, 162 (1885), the defendants appealed to *United States* v. *Thomas* as sanctioning the doctrine that the liability in such cases was that merely of a common-law bailee. The judges, however, pointed out that the case only exemplifies a well-defined exception to the general rule, and that it only goes so far as to decide that in such cases the defense of "public enemy" is sufficient to relieve from liability.

Outside of the Federal courts there are many decisions confirming the Government's contention. The courts of Pennsylvania, Massachusetts, New Jersey, Ohio, Indiana, Missouri, and several Western States are a unit on the question. See *Commonwealth* v. *Comly* (3

Barr (Pa.), 372); *Inhabitants* v. *Hazard* (12 Cushing (Mass.), 112); *Inhabitants* v. *McEachron* (33 N. J. L., 339); *State* v. *Harper* (6 Ohio, 607); *Halbert* v. *State* (22 Ind., 125); *State* v. *Jackson Township* (28 Ind., 86); *Ross* v. *Hatch* (5 Iowa, 149); *Taylor* v. *Morton* (37 Iowa, 551).

State decisions might be multiplied, but we trust that enough have been cited to show that the vast majority have been in accordance with the Federal cases. The results reached in the decisions may be summarized as follows:

1. That the execution of a bond in such cases superimposes upon the implied contract of bailment an express contract, which carries with it a greater liability. As was said by Judge Strong, in *United States* v. *Bevans*, "There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. (*United States* v. *Bevans*, 13 Wall., 56.)

2. That a bond conditioned for the *safe-keeping* of money is not discharged upon proof that the money had been burned or destroyed while in the hands of the obligor without his fault or negligence.

While it is true that in many of the cases the words *and pay over* were added in the bond, the necessity of such a clause has never been admitted in this country. No United States cases have rested on such strained and technical distinction. The case at bar, however, could not in any event be made to rest on this distinction, for the additional words, "*Until legally withdrawn*," are a portion of the bond.

3. Apart from the execution of a particular bond, *public policy* demands that receivers of public moneys and property be held to a stricter accountability than that required of ordinary bailees at common law.

4. Only two defenses have in such cases been held by the United States Supreme Court to be sufficient to discharge from liability. These defenses are, "the act of God," and "the act of a public enemy." Even robbery is not regarded as sufficient. The latter defense existed in *Boyden* v. *United States* (13 Wall., 17); *Inhabitants* v. *McEachron* (33 N. J. L., 339); *State* v. *Harper* (6 Ohio St., 607), and *Halbert* v. *State* (22 Ind., 125).

THE BOND IN THE CASE AT BAR.

The condition of Dr. Smyth's bond is as follows:

> Now, therefore, if the said Andrew W. Smyth shall faithfully and diligently perform, execute, and discharge, all and singular, the duties of the said office, according to the laws of the United States, then this obligation to be void and of no effect; otherwise, etc.

This, of course, reads into the bond the various laws of the United States prescribing the duties of the superintendent of a mint, and also the various regulations of the Mint Bureau relating to his office.

These laws and regulations may be classified as follows:

(1) The general description of the office—the control of the mint under the charge of the superintendent and the supervision of the officers and persons employed therein.

(2) His duty to render faithful reports, accounts, and statements to the Director of the Mint Bureau.

(3) His duty *to keep safely until legally withdrawn* all bullion and moneys in his custody.

(4) His duty "at the close of each annual settlement" to have a "full and accurate count and weighing of the moneys and bullion" in his possession as superintendent.

(1) Section 3503 of the Revised Statutes provides as follows:

> The superintendent of each mint shall have control thereof, the superintendence of the officers and persons employed therein, and the supervision of the business thereof, subject to the approval of the Director of the Mint. * * *

Section 8, Article XXIX, Regulations of the Mint Bureau, prescribes as follows:

> The superintendent or assayer in charge *shall devise such mode of securing the safety of the moneys, bullion, and property, and the premises of the building of which he has charge, as he may deem necessary;* and to this end he shall see that the watchmen, messengers, doorkeepers, etc., have prescribed rounds of patrol, and that a proper and careful examination is made daily to make sure that the fastenings are secure, the fires safe, and no one concealed in the building.

(2) Section 3503, Revised Statutes, provides—

> * * * He (that is, the superintendent) shall make reports to the Director of the Mint at such times and according to such forms as the Director may prescribe, which shall exhibit

in detail, and under appropriate heads, the deposits of bullion, the amount of gold, silver, and minor coinage, and the amount of unparted, standard, and refined bars issued, and such other statistics and information as may be required.

Article 30 of the Regulations provides for monthly reports of the deposits of gold and silver, quarterly coin and bullion accounts, and an annual statement of the work, etc., of the mint during the preceding year.

(3) Section 3506, Revised Statutes, prescribes as follows:

> THE SUPERINTENDENT OF EACH MINT SHALL RECEIVE AND SAFELY KEEP, UNTIL LEGALLY WITHDRAWN, ALL MONEYS AND BULLION WHICH SHALL BE FOR THE USE OR EXPENSES OF THE MINT. HE SHALL RECEIVE ALL BULLION BROUGHT TO THE MINT FOR ASSAY OR COINAGE. HE SHALL BE THE KEEPER OF ALL BULLION OR COIN IN THE MINT, EXCEPT WHILE THE SAME IS IN THE HANDS OF OTHER OFFICERS. * * *

These duties are explicit and sufficiently precise, and the defendants agreed that they would hold themselves liable if these duties were not faithfully discharged. Surely the court will not say that the many cases we have cited are inapplicable because the bond does not expressly provide for "payment over." Surely the words, "until legally withdrawn," must be regarded as equivalent. Any other construction of these words would partake of the nature of a legal quibble.

Did he "safely keep until legally withdrawn" this money?

Admittedly, when it was sought to legally withdraw it the money was gone, and had not been "safely kept." The breach of the bond is therefore indisputable.

(4) Section 4 of article 18 of the Regulations provides—

> That at the close of the annual settlement, and that at any other time the Director may require, there shall be a full and accurate count and weighing of the moneys and bullion in the possession of the superintendents of the mints * * * for the purpose of ascertaining whether the officer in charge has in his possession the amount of public moneys with which he stands charged by the Treasury Department.

Before leaving the discussion of the wording of the bond, the attention of the court is called to a provision in the Revised Statutes, which, it would appear, was intended by Congress to cover the very case in hand.

Section 3501, Revised Statutes, after prescribing that the superintendent, the assayer, the melter and refiner, and the coiner of each mint shall give bonds for the faithful and dilligent performance of their duties, provides as follows:

> Similar bonds may be required of the assistants and clerks, in such sums as the superintendent shall determine, with the approbation of the Director of the Mint; *but the same shall not be construed to relieve the superintendent or other officers from liability to the United States for acts, omissions, or negligence of their subordinates or employees;* and the Secretary of the Treasury may, at his discretion, increase the bonds of the superintendents.

The provision which we have underscored clearly contemplates such a loss as that which led to the institution of this suit. The words of the section imply a liability arising, not through the negligence of the superintendent, but through *his having unconditionally undertaken the discharge and execution of certain specific duties.* The case which Congress had in mind was in express words that of a loss arising through the act (as theft), omission, or negligence of an employee.

It is further noticeable that the superintendent is made liable for the *omissions* as well as the *negligence* of an employee, the law expressly declaring that the giving of bonds by employees shall not relieve the superintendent from liability for *acts and omissions*, as well as *negligence* of those employees.

This was clearly seen and stated by Judge Gibson, in *Commonwealth* v. *Conly.* In that case he declared:

> *A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by considerations of general policy.*

He had already said:

> *The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant.* (*Commonwealth* v. *Conly*, 3 Barr., 372.)

II.

THE PLEA *NON EST DAMNIFICATUS* DOES NOT AVAIL AGAINST AN OBLIGATION TO DO SPECIFIC THINGS.

Plaintiffs in error contend "that the entire débris of this burnt money was delivered by Smyth to the authorized representatives of the Government," and that "the Government has not suffered any substantial damages by the destruction of its own obligations." (Plaintiffs' brief, pp. 12 and 13.)

This burnt money was turned over to Dr. Barrett and Mrs. Rosenberg, the Government experts, for examination and investigation. (Rec., p. 32.) It has since been kept in the vault by the successors of Dr. Smyth, but has never been accepted by the Treasury Department. Plaintiffs in error properly characterize it as "débris," for it is no longer money, but charred paper.

The condition of Dr. Smyth's bond is that he "shall faithfully and diligently perform, execute, and discharge all and singular the duties of said office according to the laws of the United States."

> A bond conditioned for the performance of the duties of a public office generally is construed so as to embrace all the duties which by law are required of the officer and such other duties as are reasonably incident or necessary to be performed in order to give proper effect to the duties prescribed. (Am. and Eng. Ency. of Law, 2d ed., vol. 4, p. 681, and authorities cited in note 2.)

It is the duty of the Superintendent to "receive and *safely keep* until legally withdrawn all moneys or

bullion which shall be for the use or the expenses of the Mint." (R. S., sec. 3506.)

> Where the condition of a bond is merely to indemnify, the plea of *non damnificatus* is a good plea; but where a bond is not one to indemnify against damage, but an affirmative agreement to do a specific thing, liability must be adjudged, notwithstanding no loss results from the nonperformance, and *non damnificatus* or no damage is not a good plea. (Ency. of Pleading and Prac., vol. 3, p. 663, and authorities cited in Note 1.)
>
> The importance of determining whether a condition is one of indemnity or not is, practically, very great. (Am. and Eng. Ency. of Law, 2d ed, vol. 4, p. 694, and authorities cited in Note 1, on p. 695.)
>
> In an action of debt on a bond, when the condition stipulates for the performance of any particular act, the plea of *non damnificatus* is insufficient. (Am. Digest, vol. 8, p. 274, and authorities cited in paragraph 183.)

In *Hicks* v. *Hoos* (44 Mo. App., 579) the court, by Ellison, J., said:

> Though it may be said that the object in executing the bond was most probably to add to the security and thereby save the plaintiff from loss of any portion of his loan, yet the covenant is specific, and liability must be adjudged notwithstanding no loss is shown to have yet resulted from nonperformance. In such bonds *non damnificatus* is not a good plea. The distinction between indemnity against loss or

damage and a specific covenant to perform a definite thing is clearly made.

"Surely an obligation to safely keep $25,000 of the public moneys, which obligation clearly implies a safe delivery of it, can not be satisfied by the turning over to the Government of a box full of ashes claimed to be the remnants of the moneys, and if it were the law that such an issue must be submitted to a jury, an easy way may be contrived to escape the strict accountability to which all the Federal authorities hold custodians of public moneys.

As Mr. Justice McLean said in *United States* v. *Prescott* (*supra*):

> Public policy requires that every depositary of public moneys should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that *he should safely keep* [italics of the court] the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part.

So, as to the contention here made, if a custodian of public moneys may in lieu of the moneys produce ashes and assert that the moneys were United States Treasury notes and were burnt, and this should be a legal defense, then in practice it would almost always prevail, because in the nature of the matter it would

in nearly all cases be impossible for the Government to overcome the testimony of the officer. In this cause Dr. Smyth is estopped from raising the question whether the United States are damnified when United States Treasury notes are destroyed by fire. To hold him, it is sufficient to say that he has violated the obligation of his bond to safely keep and deliver those notes, which were unquestionably "moneys" of the United States. (Parlange, J., Rec., p. 22.)

III.

DEFENDANTS WERE NOT ENTITLED IN THIS ACTION TO A CREDIT FOR $1,182.

The contention that the trial court should have instructed the jury to give credit for the $1,182 which the Government experts testified was the aggregate amount of all the money burned is answered by the argument already advanced. The delivery of ashes or charred paper, which originally was $1,182 in currency, is not a fulfilment of the obligation of the superintendent "to safely keep until legally withdrawn" that sum.

Under section 951, Revised Statutes, "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury and to have been disallowed in whole or in part," etc.

In this case no claim for credit or set-off was ever presented to the proper officers and disallowed. In

Yates et al. v. *United States* (90 Fed. Rep., 57), which was an action against Yates, an Indian agent, and the sureties on his official bond to recover money in Yates's hands, the circuit court of appeals, ninth circuit, in discussing Yates's claim to a credit of $117.35 for authorized traveling expenses, said:

> There is no competent evidence in the record that any voucher was presented to the accounting officers, as requested by the letter of the Commissioner. All presumptions are in favor of the judgment. In order to secure a reversal or modification of the judgment, the plaintiffs in error must affirmatively show that the item of $117.35 was disallowed, in whole or in part. This they have failed to do. The proper evidence to show that a claim has been disallowed by the accounting officer is by the transcript from the books of the Treasury. No particular form is essential to the allowance or disallowance of a claim, but a mere suspension of action is not a disallowance.

See also *United States* v. *Fletcher* (147 U. S., 664).

Attention is here directed to certain testimony of H. C. Steirs, a representative of the Treasury Department and the first witness for the Government.

> Q. Now, look at that whole account of Dr. Smythe, and see if there is any mention made there, and if there is, point it out to us, of any shortage or deficit of $25,000.
>
> A. There is not. There is a balance here in what is termed the Treasury note account, admitted by Dr. Smythe, of $428,520.59, admitted as due to the United States by Dr. Smythe.

Q. You counted that money?

A. Yes, sir.

Q. That is the last account Dr. Smythe made to the Government?

A. Well, that is the balance on the 30th of June; that is the count made here, that goes up to the date of the transfer; but there are no differences in the balances; the balances are the same.

Q. That is his last fiscal year account?

A. Yes, sir.

Q. And it was not until you counted, according to this document, page 1, that you found the actual deficit of $25,000?

A. I counted this Treasury note account to find the balance there, as I had previously found in the other account here, and instead of $428,520.59 I found it only $403,520.59; Dr. Smythe, in all of his accounts, admitting $428,520.59 as the balance due from him to the United States.

Q. And in the subsequent account also?

A. In all the accounts of Dr. Smythe.

Q. Turn to that account and mark it with a letter.

A. Yes, sir; it agrees absolutely with this statement—the Treasury Department statement. This is the account of July 24, 1892, the date of the transfer.

Q. That is when he went out of office?

A. Yes, sir; the account is up to July 24, 1893, the time when he went out of office and Mr. Cade took possession.

Q. Does he include the $25,000 in the account of Treasury notes?

A. Certainly.

Q. He never has excluded it?

A. No, sir; never—always $428,520.59, as due the United States by him.

Q. And you never ascertained the deficit until you counted?

A. No, sir; I counted $428,520.59, and found $403,520.59.

Q. Then the last report made by Mr. Smythe to the United States was the report in which he included in his Treasury note account this $25,000 as due the Government?

A. Yes, sir; I was going to say that that agrees absolutely with the Treasury Department.

Q. Does it not agree with Dr. Smythe's account?

A. Certainly; Dr. Smythe never changes his statement that he is responsible to the United States for $428,520.59. That includes the deficit. The Treasury Department makes up a statement, which agrees with Dr. Smythe's, that he owes $428,520.59, and therefore when we gave Dr. Smythe credit for the amount transferred to Overton Cade, we still held Dr. Smythe as owing the Government $25,000, in accordance with his own statements, and it so stands on the books of the Treasury Department to-day.

(Record, p. 30.)

A further answer to the contention of plaintiffs in error is that under the regulation and practice of the Treasury Department, only bills the complete fragments of which can be put together will be redeemed

and new notes issued therefor. Incomplete fragments will not be redeemed, and the fact that no evidence was offered that Dr. Smyth had ever sought to have this charred "débris" redeemed justifies the presumption that its condition was such that it was not redeemable. The fact that the Government experts, after a very critical examination, were able to say that the "débris" represented $1,182, without more, did not entitle Dr. Smyth to have new bills issued for that amount.

IV.

INTEREST SHOULD BE COMPUTED FROM THE TIME DR. SMYTH RECEIVED THE MONEY.

Under section 3624, Revised Statutes, "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due the United States, upon the adjustment of his accounts, * * * an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury," shall be collected on such judgments.

Plaintiffs in error rely upon the act of August 8, 1888 (25 Stat., chap. 787, p. 387), which provides in effect that sureties on bonds shall be notified whenever any deficiency shall be discovered, "but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond."

The sureties on this bond were notified, but not immediately. The fact that interest in such cases is to be computed from the time the principal receives the

money, which, in fact, may be months or even years prior to the discovery of a deficiency, is a sufficient answer to the contention of plaintiffs in error that interest is recoverable from sureties only from date of notice.

V.

The contention of the plaintiffs in error that the judgment rendered against W. H. Byrnes, administrator of the succession of Edward Conery, deceased, *in solido* with the other defendants, should have been rendered against said administrator, payable only in due course of administration, is purely technical and without merit. Under section 3467, Revised Statutes, it is provided that—

> Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.
>
> Under the acts of Congress, which control all State laws for the distribution of estates, debts due to the United States take precedence of all other debts of the decedent. (1 Ed. Am. Enc. of Law, vol. 5, pp. 248, 249; note 3, and authorities there cited. *Ibid.*, vol. 2, p. 466):
>
> Debts due the United States are entitled to priority of payment by the estate of a deceased debtor. (R. S., 3466, 3468. Notes 9–10.)

As this judgment would take precedence of all other debts of the decedent, it in fact makes no difference whether the judgment is payable in due course of administration or otherwise. Moreover, assuming the correctness of the contention that this executory judgment against plaintiff in error Byrnes should be payable only in due course of administration, we submit that the judgment would be thus interpreted. The record fully discloses Byrnes's status in this proceeding, and the words "in due course of administration" would, if necessary, be supplied.

Respectfully submitted.

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